No. 17-1594

IN THE

Supreme Court of the United States

RETURN MAIL, INC.,

Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Federal Circuit

BRIEF FOR THE CATO INSTITUTE AND PROFESSOR GREGORY DOLIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the government is a "person" who may petition to institute review proceedings under the America Invents Act.

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INTEREST OF AMICI CURIAE*

The Cato Institute is a nonpartisan, public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences; publishes books, studies, and the annual *Cato Supreme Court Review*; and files *amicus* briefs.

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Amici are interested in preserving the separation of powers, which in this case is also important to the stability of legal standards and due process for patent-review proceedings. For the reasons explained in this brief, the government's position jeopardizes these interests.

INTRODUCTION

Return Mail's opening brief provides all the justification this Court needs for reversing the Federal Circuit. This amicus brief provides two more reasons for doing so. ***First***, the government's reading of "person" in the America Invents Act would disrupt the uniform enforcement and application of the patent

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* In accordance with Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in any part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution to fund its preparation and submission. All parties have consented in writing to the filing of this amicus brief.

laws by permitting independent agencies to challenge the rest of the Executive Branch's interpretation of those laws in court. *Second*, the government's reading would create Due Process problems by forcing patentees to defend the patentability of their patents before the Executive Branch in cases where the Executive Branch has a direct interest and the power to manipulate the outcome of the proceedings. To avoid these results, the Court should read "person" as Return Mail does, and hold that it does not include executive agencies.

SUMMARY OF ARGUMENT

The Constitution vests all executive power in one person: the President of the United States. It elsewhere limits the ways in which he can exercise that power. For example, while this Court's precedents permit executive agencies to adjudicate post-grant patentability challenges, the Due Process Clause requires agencies to provide an impartial forum. *See Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1370, 1379 (2018); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). The government's position—under which executive agencies are "person[s]" who can institute review proceedings under the America Invents Act, BIO.8—will cause the Act to run afoul of these principles in certain applications. The Court should avoid that by holding that "person," as used in the America Invents Act, does not include executive agencies.

I. If the word "person" in the America Invents Act included executive agencies, then it would permit independent executive agencies to undermine the uniform enforcement of the patent laws. Indeed, it would

allow for "the constitutional oddity of a case pitting two agencies in the Executive Branch against one another." *S.E.C. v. Fed. Labor Relations Auth.*, 568 F.3d 990, 996 (D.C. Cir. 2009) (Kavanaugh, J., concurring). The Act permits "person[s]" to initiate *inter partes*, post-grant, and covered-business-method review proceedings before the Patent Trial and Appeal Board. *See* 35 U.S.C. §§ 311, 321; America Invents Act § 18(a)(1)(B), Pub. L. No. 112-29, 125 Stat. 284, 329–31 (2011). It permits those same persons to appeal the Board's decision to the Federal Circuit, where the PTO Director may intervene to defend the Board's decision. *See* 35 U.S.C. §§ 319, 329, 143; America Invents Act § 18(a)(1), 125 Stat. at 329–31. If these "persons" include executive agencies, then the America Invents Act permits one executive agency—for example, the Postal Service—to challenge another's interpretation and application of federal law, and even to litigate that dispute against the other agency (the PTO) in an Article III court.

This is an oddity because the Constitution vests "[t]he executive Power" in the President alone. U.S. Const., Art. II, § 1, cl. 1. Thus, a case in which one agency challenges another's enforcement of the law amounts to a case in which the President is challenging himself. The oddity can arise because this Court's precedents permit Congress to create "independent agencies"; that is, executive agencies whose heads are to some degree insulated from Presidential control. *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 630–32 (1935). Because of this insulation, independent agencies (like the Postal Service) can take positions at odds with the President's own. *But see PHH*

Corp. v. CFPB, 881 F.3d 75, 135 (D.C. Cir. 2018) (Griffith, J., concurring in judgment) (arguing that the heads of independent agencies can generally be removed "based on policy decisions that amount[] to inefficiency."). The result is a plural Executive; a multi-headed Executive that may not always agree with itself, and that may even wind up in litigation against itself.

But even though this Court's precedents (in contrast to the Constitution) *permit* Congress to redistribute executive power to independent agencies, they allow it to do so only with "very clear and explicit language." *Shurtleff v. United States*, 189 U.S. 311, 315 (1903). Thus, if Congress wishes to divide executive power by allowing independent agencies to challenge the Executive Branch's application of law in court, it should have to do so clearly.

The America Invents Act does not even approach that level of clarity. For all the reasons in Return Mail's brief, "person" is best understood *not* to include executive agencies. But even if the Court thinks the issue is close, it should reject the Federal Circuit's reading because Congress has not clearly permitted executive agencies to undermine in court the uniform execution of the patent laws.

II. The Fifth Amendment's Due Process Clause requires the President to provide impartial forums for any administrative adjudications. *See Gibson*, 411 U.S. at 579. But if the word "person" in the America Invents Act includes executive agencies, then it will be impossible for the Executive to provide a forum free of actual or apparent bias in certain matters. This follows from three aspects of the patent system.

First, the Patent Trial and Appeal Board is composed of administrative patent judges who serve at the pleasure of the Director; himself a "political appointee who serves at the pleasure of the President." *Oil States*, 138 S. Ct. at 1380 (Gorsuch, J. dissenting) (citing 35 U.S.C. §§ 3(a)(1), (a)(4)). This creates pressure to achieve the Director's (and, ultimately, the President's) preferred resolution of any given patent dispute.

Second, the Director may "select which" judges, "and how many of them, will hear any particular patent challenge." *Id.* at 1381 (citing 35 U.S.C. § 6(c)). Thus, the Director can "stack" panels, selecting judges who he knows are most likely to reach his preferred result. "If they (somehow) reach a result he does not like, the Director can add more members to the panel—including himself—and order the case reheard." *Id.* (citing 35 U.S.C. §§ 6(a), (c)). The Director has in fact exercised this authority on multiple occasions, ordering rehearing and stacking panels to obtain a new result. *Infra* 15–16; *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co. Matal*, 868 F.3d 1013, 1020 (Fed. Cir. 2017) (Dyk, J., concurring).

Finally, the Executive Branch has an interest in the cancellation of certain patents. While it cannot be sued for infringement, it *can* be sued for a takings violation if it practices a patented invention without a license. 28 U.S.C. § 1498.

Combining these three features of the patent system creates a significant problem for the government's reading of "person." If this word includes executive agencies, then one executive agency with an interest in canceling a patent can initiate review before another arm of the Executive, and that second

arm of the Executive can rig the proceedings to ensure (or increase the odds of) cancellation. This creates, at bare minimum, an unconstitutional appearance of bias in review proceedings initiated by an executive agency. The Court can avoid this particular Due Process problem by giving "person" its well-established meaning, under which it does not include "the sovereign." Scalia & Garner, READING LAW § 44, p.273 (2012) ("The word *person* includes corporations and other entities, but not the sovereign.").

ARGUMENT

The America Invents Act allows "person[s]" to initiate reviews of patents. The Act means what it says: only persons can petition for review. Since executive agencies are not persons—either in everyday English, under the relevant statutory definitions, or in light of this Court's precedents—that should be the end of the matter. *See* Petr's Br. 20–32. But to the extent the Court finds the issue close, two further concerns militate against the government's reading. ***First***, that reading would allow independent agencies to undermine the President's control over the Executive Branch. ***Second***, if executive agencies can initiate these proceedings, then in at least some cases there will be a risk of actual or perceived bias against the patentee and in favor of the Executive Branch challenger.

I. Return Mail's interpretation of "person" helps preserve the uniform execution of the patent laws.

If the America Invents Act's use of "person" includes executive agencies, then it permits independent agencies to challenge the President's enforcement

and application of the patent laws in court. Assuming such suits should *ever* be permitted, statutes should be read to allow them only when they do so clearly. The Act's use of "person" does not satisfy that clear-statement requirement.

A. Congress must speak clearly to permit the division of executive authority.

Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Among the biggest "elephants" are laws that interfere with, or intrude upon, the powers of other constitutional actors. Thus, for example, this Court requires a very clear statement before it will read a congressional enactment to regulate matters traditionally left to the states, such as "purely local crime." *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 859–60 (2014). Similarly, the Court applies an analogous requirement to laws alleged to strip federal courts of jurisdiction over constitutional claims. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988). And, most relevant here, the Court requires "very clear and explicit language" before it will read a statute to limit the President's constitutional powers—for example, his power to remove executive officers. *Shurtleff v. United States*, 189 U.S. 311, 315 (1903); *see also Free Enter. Fund v. PCAOB*, 561 U.S. 477, 546 (2010) (Breyer, J., dissenting) (quoting *Shurtleff*).

Permitting independent agencies to challenge actions by other parts of the Executive Branch in court certainly limits the President's executive authority. To see why, begin with Article II's vesting clause: "The executive Power shall be vested in a President of the United States." Art. II, § 1, cl.1. This clause

speaks of "[t]he executive power"; not "*some of* the executive power, but *all of* the executive power." *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting). And because this power is vested in a single person—"a President of the United States"—Congress may not assign any of it to some other actor. It is the President's alone. The complete and indivisible nature of this power is irreconcilable with permitting an executive agency to undermine the President's uniform application of the law—such as by challenging him (or his subordinates) in court. If agencies have the power to take a position at odds with the President's understanding of the laws, then the Executive is in no sense unitary.

That is what makes "a case pitting two agencies in the Executive Branch against one another" a "constitutional oddity." *SEC*, 568 F.3d at 996 (Kavanaugh, J., concurring). Such suits rarely arise; and they should never arise if the Executive Branch is properly treated as a unitary entity. These cases arise nonetheless because this Court has carved out "extra-constitutional" exceptions to Article II's vesting clause. *Id.* at 997. In particular, this Court long ago approved of independent agencies. *See Humphrey's Executor*, 295 U.S. at 631–32. "Independent agencies are those agencies whose heads cannot be removed by the President except for cause and that therefore typically operate with some (undefined) degree of substantive autonomy from the President." *SEC*, 568 F.3d at 997 (Kavanaugh, J., concurring). This "independence" permits intra-Executive disputes that the President is hindered in resolving. It also permits agencies to be adverse to one another as required for Article III standing; such adversity is impossible in

disputes between *non*-independent agencies, since those agencies are "subordinate parts of a single organization" headed by the President. *Id.*

As alluded to above, the Court's approval of independent agencies is tempered by a clear-statement rule: exceptions to the President's power to remove (and thus control) agency heads can be imposed only with "very clear and explicit language." *Shurtleff*, 189 U.S. at 315; *see also Free Enter. Fund*, 561 U.S. at 546 (Breyer, J., dissenting). This ensures that any further erosion of the unitary Executive—to the extent it is allowed at all—comes from Congress, and only as a result of Congress's deliberate choice.

The same logic that supports a clear-statement rule for the *creation* of independent agencies applies *a fortiori* to laws permitting independent agencies to challenge other agencies' determinations in court. Because such intra-branch challenges put the Executive Branch at war with itself, they are even more inconsistent with the notion of a unitary Executive than restrictions on removal. The Framers adopted the unitary model to ensure, among other things, "uniform application of the law." *Morrison*, 487 U.S. at 732 (Scalia, J., dissenting); *see also* The Federalist No 70, 471 (A. Hamilton) (J. Cooke ed. 1965); Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 538 & n.122 (2005). What could be more contrary to uniformity than two members of the same Executive Branch seeking judicial resolution of a dispute regarding the meaning or application of federal law? *See* Letter from the Justices of the Supreme Court to George Washington (Aug. 8, 1793), in 6 Documentary History of the Supreme Court Of The United States, 1789-1800, at 755 (rejecting the invitation to advise

the President on a resolution of a difficult legal question and leaving it to the President's "Judgment [to] discern what is Right ... [for] the Preservation of the Rights, Peace, and Dignity of the United States.").

The Framers similarly believed that a unitary Executive enhanced accountability; if the buck stops at the President's desk, he cannot (easily, anyway) attribute his failings to others. *See* The Federalist No. 70 at 476 (A. Hamilton); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23, 42–45 (1995). That accountability is seriously undermined if the President's control is so lacking that one of his subordinates can, without his approval—or even in the face of his *dis*approval—challenge his interpretation and application of the laws in court.

Of course, the Executive can *change* its interpretation of federal law. Thus, it may disavow some previously taken position. For example, an executive agency (independent or otherwise) that disputes a patent's validity in a federal lawsuit against a private party is not *necessarily* acting contrary to the concept of a unitary Executive; it may be that the entire Executive Branch would now agree that the patent is invalid. In these cases, the Executive merely states that it erred when it issued the patent and now seeks, as a matter of equity, judicial cancellation of the same. *Cf. United States v. Schurz*, 102 U.S. 378, 401–02 (1880). This is entirely consistent with the ancient practice of patent cancellation on a writ of *scire facias*. *See id.* at 404; *Oil States*, 138 S. Ct. at 1376. It is also consistent with permitting the Patent Office to *sua sponte* order patents into ex parte reexamination, *see* 35 U.S.C.

§ 303(a); 37 C.F.R. § 1.520, because, again, the Executive Branch is speaking with one voice, even if the content of its speech has changed. The problem arises when an agency seeks judicial resolution of a dispute with another part of the Executive Branch; for example, when an independent agency seeks to overturn an adverse decision of another agency in court, or (more starkly) when an independent agency litigates against the other agency in federal court. *That* cannot be squared with the concept of a unitary Executive.

None of this is to deny that this Court's precedents permit suits between independent agencies and the rest of the Executive. They do. *See, e.g., United States v. ICC*, 337 U.S. 426, 430 (1949). But just as the Court requires Congress to speak with "very clear and explicit language" before limiting the President's removal power, *Shurtleff*, 189 U.S. at 315, so too should it require very clear and explicit language before reading a statute to permit independent agencies to seek in-court resolutions of intra-Executive disputes.

B. The proper reading of "person" reduces intra-Executive conflict.

The government's unnatural reading of "person" in the America Invents Act—under which "the United States is a 'person,'" BIO.8—allows for "the constitutional oddity of a case pitting two agencies in the Executive Branch against one another." *SEC*, 568 F.3d at 996 (Kavanaugh, J., concurring). Because the statute is susceptible of other interpretations—indeed, far better interpretations—Congress has not spoken with the clarity needed to permit such suits.

Three separate provisions of the Act permit a "person" to petition the PTO to institute review proceedings in the Patent Trial and Appeal Board (which is part of the PTO). *See* 35 U.S.C. §§ 311, 321; America Invents Act § 18(a)(1)(B), Pub. L. No. 112-29, 125 Stat. 284, 329–31 (2011). If the Director grants the petition, the Patent Trial and Appeal Board will reassess the patentability of the patent that the "person" challenges.

None of those provisions, standing alone, threatens to improperly divide executive power. Indeed, because the PTO is a traditional executive agency (rather than an independent agency), encouraging agencies to take up their disagreements regarding the PTO's patent issuance with the PTO itself could help *preserve* uniformity in the patent law by channeling all intra-Executive patent disputes to the President for a definitive statement of the Executive's views.

The trouble arises because, if "person" includes executive agencies, the PTO's resolution *does not* definitively resolve the Executive's views. The Act permits any "party dissatisfied with the final written decision" of the Board to "appeal the decision pursuant to sections 141 through 144" of the Patent Act. *See* 35 U.S.C. §§ 319, 329. Sections 141 through 144 permit an appeal to the Federal Circuit, where the PTO Director can "intervene" and defend the Board's ruling. *Id.* at § 143. Thus, if an agency were to appeal the Board's reaffirmation of patentability, its appeal to the Federal Circuit would risk pitting the Executive Branch against itself: the PTO Director versus some other agency. Indeed, even if the Director *does not* intervene, such appeals still entail a dispute between

the appealing agency and the PTO regarding the application of federal law.

This problem could perhaps be avoided in practice if the President retained control over all agencies; if that were the case, the President could forbid such appeals. But he lacks this control: independent agencies can act contrary to his wishes with little repercussion. This case did not give rise to this scenario, because the Board happened to agree with the Postal Service—an independent agency—that Return Mail's invention is not patentable. (The Board rejected the Postal Service's arguments in an earlier *ex parte* reexamination, but changed its position in the proceedings below. *See* Cert. Petn. 9.) More is at stake, however, than the result in this case. Under the government's interpretation of "person," the America Invents Act allows agencies to challenge the PTO's patentability determinations in court. The Court should not sanction that reading absent "very clear and explicit language" requiring it. *Shurtleff*, 189 U.S. at 315. Here, there is none.

* * *

All this is perhaps gilding the lily, since the word "person" does not include the United States for all the reasons in Return Mail's brief. But insofar as the Court finds any ambiguity, it should resolve it against the government.

II. The Federal Circuit's interpretation also raises Due Process concerns.

To say that the President possesses all executive power is not to say that he can exercise it however he pleases. The Constitution imposes limits. For exam-

ple, while this Court's precedents permit the Executive to adjudicate certain disputes—including *inter partes* and post-grant reviews, *Oil States*, 138 S. Ct. at 1370—the Due Process Clause requires that it provide an impartial forum. The government's reading of "person" brings the Act into conflict with this requirement, by forcing some patentees to litigate disputes before the Executive Branch notwithstanding that branch's interest in the case and ability to manipulate the results.

A. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). As a result, officials "acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy." *Tumey v. State of Ohio*, 273 U.S. 510, 522 (1927). This rule long predates the Constitution. *See, e.g.*, *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (C.P. 1610). It still applies today to Article III judges. And, as is true of "(m)ost of the law concerning disqualification," it applies "with equal force to . . . administrative adjudicators." *Gibson*, 411 U.S. at 579. Individuals or tribunals may not exercise judicial or quasi-judicial authority over disputes that implicate their interests.

There is no doubt that *inter partes* and post-grant review proceedings are quasi-judicial. Each involves discovery (including depositions of witnesses), briefing and motion practice, and oral argument in front of the Patent Trial and Appeal Board prior to its rendering a final written decision. *See Oil States*, 138 S. Ct. at 1378. These proceedings "mimic[] civil litigation." *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1352 (2018). Thus, they must accord with the dictates of due process. And even if that were not true, courts

should be reluctant to read a congressional act as permitting a hearing before a potentially biased tribunal. *Cf. Oil States*, 138 S. Ct. at 1381 (Gorsuch, J. dissenting) (noting potential Due Process problems that arise from "panel-stacking" in *inter partes* review).

B. If the government is correct about the meaning of "person," a potentially biased tribunal is exactly what some patentees may receive. To see why, first consider two aspects of the Director's authority:

The first important consideration is that the administrative patent judges who sit on the Patent Trial and Appeal Board serve at the Director's pleasure. *See* 35 U.S.C. § 6(a); *see also* Jonathan S. Masur, *Patent Inflation*, 121 Yale L. J. 470, 496 n.106 (2011). This gives the Director (and the President, to whom he reports) significant ability to sway the resolution of any proceeding before these judges. *See Oil States*, 138 S. Ct. at 1381 (Gorsuch, J., dissenting).

The second important consideration is that the Director can "stack" panels. The Director need not randomly select judges for the Board's panels, as the clerk's office of an appellate court would. Instead, the Director is free to add as many judges as needed to obtain the result he prefers. *See Oil States*, 138 S. Ct. at 1381 (Gorsuch, J., dissenting). Directors have in fact exercised this power to alter the outcome of proceedings. *See* Gregory Dolin, *Yes, the PTAB is Unconstitutional*, 17 Chi.-Kent J. Intel. Prop. 457, 482–83 (2018). In *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, for example, the Director granted rehearing of a three-judge panel's decision, added two more-favorable judges, and changed the result: instead of a 2-1 decision for the patentee, the Board issued a 3-2 decision for the challenger. 868 F.3d at

1015–16; *see also* IPR2015-00762, Paper Nos. 12, 16 (PTAB). In *Target Corp. v. Destination Maternity Corp.*, the Director, after failing to achieve an unpatentability finding, added two members. The new panel ruled for the challenger 4-3. IPR2014-00508, Paper Nos. 18, 28, 31, 32 (PTAB).

These two attributes of the Director's power give him—and, by extension, the President—immense power to sway the outcome of any particular proceeding. *See* Dolin, 17 Chi.-Kent J. Intel. Prop. at 483 (noting that "if the Director can order the Board to [change its judgment], so too can her bosses—the Secretary of Commerce and the President."). And that is particularly worrisome in cases where one executive agency, particularly a traditional one under the President's control, asks the PTO to review and cancel an already-issued patent. The Executive Branch has a direct, financial interest in the cancellation of many patents, because it can be sued for taking property without just compensation if it practices a patent without a license. 28 U.S.C. § 1498. Particularly where such a license would be expensive, the Executive has an obvious interest in cancelling the patent so that it can practice it for free. The government's reading of "person" makes it easier to achieve that result: if "person" includes executive agencies, then the Executive can initiate a review proceeding before the Board and assure a favorable resolution by manipulating the panel's composition—a panel that will in any event consist of *non*-independent judges whose professional interests involve pleasing the Director and the President. This creates an appearance of bias at best, and actual bias at worst. The Court should not read a statute to permit such actual or apparent bias.

It is no answer to say that the patentee can appeal any adverse decision to the Federal Circuit. "Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 618 (1993). And here, the appeal is *not* de novo; the Federal Circuit reviews "the Board's legal conclusions de novo," but "its fact findings for substantial evidence." *Bennett Regulator Guards, Inc. v. Atlanta Gas Light Co.*, 905 F.3d 1311, 1314 (Fed. Cir. 2018).

This problem, just like the problem discussed in the previous section, is avoided by giving "person" the reading for which Return Mail advocates. To be sure, this may leave the PTO Director with the ability to manipulate panels to achieve the results he wants—he may even do so to benefit the Executive Branch. But reading "person" as not including executive agencies at least eliminates one class of cases in which the risk of bias is particularly stark.

CONCLUSION

This Court should reverse the Federal Circuit's judgment.

DECEMBER 17, 2018

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